IN THE

Supreme Court of the United States.

No. 641.

M. ANDERSON,
Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION) CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE,
Appellee.

No. 642.

N. JORDAN,
Appellant,

vs.

THE PACIFIC COAST COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE,
Appellee.

BRIEF FOR APPELLEES COVERING BOTH APPEALS.

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THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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M. ANDERSON,
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vs.
THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship *Queen*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Appellee.
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N. JORDAN,
Appellant,
vs.
THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship *Umatilla*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,
Appellee.
No. 642

Brief for Appellees.

The four questions certified by the Circuit Court of Appeals raise substantially the broad question whether the steamships *Queen* and *Umatilla* when sailing under register on voyages between San Francisco and United States ports on Puget Sound, stopping *en route* at Victoria, B. C., are liable when entering or leaving San Francisco to

pay the pilotage fees levied by the California statutes of 1905, even though they were in charge at the time of officers holding federal pilots' licenses for the port of San Francisco and were, in fact, piloted by such officers when entering or leaving that port.

The appellants' argument, when analyzed through a study of their brief, consists in substance of two points: First, that Congress has withdrawn from state pilotage regulation only those vessels referred to in R. S. Section 4401, to wit: coastwise steam vessels not sailing under register, which means only steam vessels sailing under license; and second, that even if Congress has withdrawn from state pilotage regulation all coastwise steam vessels, that expression includes only steam vessels engaged exclusively in the coasting trade which do not stop at foreign ports for any purpose.

In order to sustain the first point the appellants recognize that Congress has made a distinction between coastwise steam vessels which sail under register and those which do not sail under register, and that vessels which are sailing from one port to another of the United States and which stop en route or incidentally at foreign ports, and for this reason must sail under register, are, nevertheless, coastwise steam vessels. They contend, however, that Congress intended that coastwise steam vessels of this latter class as well as all other steam vessels sailing under register, should still be subject to pilotage regulation by the states. One obvious difficulty with this argument is that it makes § 4444 wholly superfluous and gives no meaning or effect to any of its provisions.

In order to sustain the second point, appellants attempt to give some meaning and effect to Section 4444, but only by giving to the expression "coastwise steam vessels" a construction which is both

strained and unnatural and directly inconsistent with the contentions previously made in an effort to sustain their first point. They contend in effect that this expression in Section 4444 means only those steam vessels which, whether registered or licensed, are engaged exclusively in coasting trade. They recognize, however, in this connection, that the states cannot regulate the pilotage of coastwise steam vessels which are sailing under register and are in fact engaged exclusively in the coasting trade, which is directly contrary to their contention under the first point that the states can regulate the pilotage of all vessels sailing under register whether engaged exclusively in the coasting trade or exclusively in foreign trade, or in both the coasting and the foreign trade.

It is obvious that the appellants' contentions must fall of their own weight when they are compared with the other contentions made by the appellants, and that neither construction of the statutes suggested by appellants will stand the fundamental rules and tests for statutory construction, because they do not give effect to all the provisions of the statutes and do not recognize that Congress, when using different expressions in different parts of the same statute, must have intended that they should have different meanings rather than the same meaning. When Congress referred in § 4401 to coastwise steam vessels not sailing under register, it must have contemplated that there were or might be coastwise steam vessels which were sailing under register, and when it referred in § 4444 to "coastwise steam vessels" without adding the qualifying words "not sailing under register" it clearly intended to include all coastwise steam vessels, both those sailing under register and those not sailing under register. It is also clear that when Congress provided in Section 4444 that no pilot charges should be levied by any state upon

any steamer piloted as provided in Title 52, it intended those words to have some meaning and effect beyond that already expressed and accomplished in Section 4401, and that it would not have added this prohibitory clause if it were wholly unnecessary. By providing in Section 4401 that coastwise steam vessels not sailing under register should, except on the high seas, be under the control and direction of federal pilots, it clearly intended that such vessels should not be under the control or direction of state pilots when entering or leaving ports, and it would necessarily follow that no state could lawfully require any such vessel to take a state pilot for the purpose of entering or leaving port and *a fortiori* could not levy upon any such vessel any pilotage charges.

We contend that all the provisions of Section 4444 have a definite and well-defined meaning and effect, as will appear from a study of the history of the legislation of Congress upon the subject of pilotage, and that the effect of the present statutes is to withdraw wholly from state pilotage regulation all coastwise steam vessels not sailing under register, to prohibit the states from requiring coastwise steam vessels sailing under register to take a pilot when entering or leaving port or to levy any pilot charges upon any such vessel, if at the time it is piloted by a federal pilot licensed for the port in question, and to leave to the States the power to require vessels, other than coastwise steam vessels, to take a state pilot when entering or leaving port.

We further contend that the steamers *Queen* and *Umatilla* involved in these actions, even though sailing under register and stopping incidentally at a foreign port, are coastwise steam vessels, and were at the times mentioned in the certificate piloted by a federal pilot licensed for the port of San Francisco.

We agree with appellants that in order to ascertain the true meaning and effect of the present statutes it is necessary to examine the history of the legislation of Congress upon the subject of pilotage, but we claim that it is necessary to go back farther and study the history of such legislation more carefully than the appellants have done. We contend that in 1866 Congress placed all seagoing steam vessels subject to the Navigation Laws of the United States, under the exclusive control and direction of federal pilots, except when on the high seas, and withdrew such vessels entirely from state pilotage regulation when entering or leaving ports, and that the effect of the subsequent statutes has been to limit the exclusive control over port pilotage assumed by Congress and to give back to the states certain powers of regulation which had in 1866 been taken away from them; and that for this reason such provisions of the present statutes as give to the states any powers to regulate port pilotage should be construed strictly against the states. When this contention is established, the meaning and effect above suggested for Sections 4401 and 4444 of the Revised Statutes will appear clearly to be correct. It is only by this means, we submit, that an intelligent and reasonable meaning can be given to all the provisions of these sections.

We rely upon the following well-established rules of statutory construction:

Effect must be given to all provisions of a statute if such a construction is consistent with the general purposes of the Act and the provisions are not necessarily conflicting. One provision should not be construed to defeat or destroy another, but rather to explain and support it. If the same words or expressions occur in different parts of a

statute, they must, as a general rule, be taken to mean the same thing.

Market Co. *vs.* Hoffman, 101 U. S., 112, 115;
Bernier *vs.* Bernier, 147 U. S., 242, 246;
United States *vs.* Hill, 123 U. S., 681;
Re Jackson, 40 Fed. Rep., 372.

The office of a proviso generally is either to except something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extended to cases not intended by the legislature to be brought within its purview. Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall clearly within its terms. A proviso carves special exceptions out of the enacting clause, and those who set up any such exceptions must establish it as being within the words as well as within the reason thereof.

United States *v.* Dickson, 15 Peters, 141, 165;
Ryan *v.* Carter, 93 U. S., 78, 83;
Minis *v.* U. S., 15 Peters, 423, 445;
Selma R. R. Co. *v.* U. S., 139 U. S., 566;
Georgia R. R. Co. *v.* Smith, 128 U. S., 181.

A proviso is most frequently intended to restrain the enacting clause and to except something which would otherwise have been within it. As a corollary, it is held that the general language in the enacting clause should be so construed that it

would cover the matters contained in the proviso, if the enacting clause had stood alone.

Thaw *v.* Ritchie, 136 U. S., 519, 541;
Wayman *v.* Southard, 10 Wheaton 1, 30.

It is also held that when a new statute is enacted which covers the same subject matter as an old statute, but expressly repeals the old statute, it should be construed as continuing the old statute with such amendments, modifications or changes as may appear in the new statute, and that the new statute should be construed to change or modify the old statute only in so far as such changes or modifications are clearly indicated.

Steamship Co. *v.* Joliffe, 2 Wall., 450;
McDonald *v.* Hovey, 110 U. S., 619, 629;
U. S. *v.* Ryder, 110 U. S., 729, 740.

If the new statute is ambiguous, the Court is authorized to refer to the original statutes, from which the new section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply.

The Conquerer, 166 U. S., 110, page 122;
U. S. *v.* Bowen, 100 U. S., 508;
Meyer *v.* Car Co., 102 U. S., 1, 11;
U. S. *v.* Latcher, 134 U. S., 624.

POINT I.

The States have no power to levy pilot charges upon any coastwise steam vessel or to compel any such vessel to take a pilot, when entering or leaving port, if such vessel is not sailing under register or is in fact piloted by a Federal pilot licensed for the port in question.

It is conceded that Congress has, under the constitution, full and plenary power to regulate port pilotage as well as pilotage during voyages, and that all acts of Congress relating to this subject are valid.

The first act of Congress relating to pilotage was passed August 7, 1789, being Section 4 of Chap. 9 of "An Act for the establishment and support of lighthouses, beacons, buoys and public piers." It provided as follows:

> "All pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose until further legislative provision shall be made by Congress." 1 Stats. at Large, p. 54.

This provision has never been expressly repealed, although it has to a large extent been superseded by subsequent legislation but has remained in the statutes ever since 1789, and appears now as §4235 of the Revised Statutes.

On March 2nd, 1837, Congress enacted as Chap. 22 of "An Act Concerning Pilots"

> "That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot duly licensed or authorized by the laws of either of the states bounded on the said waters to pilot said vessel to or from said port; any law, usage, or custom to the contrary notwithstanding." 5 Stats. at Large, p. 153.

Certain acts were passed in 1838 and 1843 to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, but they related chiefly to inspection of boilers, life preservers, etc., and not in any way to pilotage.

The first act of Congress making any provision for pilots to be licensed by federal authorities was passed August 30, 1852, being entitled "An Act to provide for the better security of lives of passengers on board of vessels propelled in whole or in part by steam and for other purposes." This act contained among others the following provisions:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no license, register, or enrolment, under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector, to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second sec-

tion of the act to which this is an amendment."

SECTION 9. "*And be it further enacted*, That instead of the existing provisions of law for the inspection of steamers and their equipment, and *instead of the present system of pilotage* of such vessels, and the present mode of employing engineers on board the same, the following regulations shall be observed, to wit:" * * *

SIXTH.—"The said inspectors shall keep a regular record of certificates of inspection of vessels, their boilers, engines, and machinery, whether of approval or disapproval, and when recorded, the original shall be delivered to the collector of the district; they shall keep a like record of certificates, authorizing gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids and materials which ignite by friction, or either of them, to be carried as freight, by any such vessel and when recorded deliver the originals to said collector; they shall keep a like record of all licenses to pilots and engineers, and all revocations thereof, and shall from time to time report to the supervising inspector of their respective districts, in writing, their decisions on all applications for such licenses, or proceedings for the revocation thereof, and all testimony received by them in such proceedings."

SEVENTH. "The inspectors shall license and classify all engineers and *pilots* of steamers carrying passengers."

NINTH. "Whenever any person claiming to be a skilful pilot for any such vessel shall offer himself for a license, the said board shall make diligent inquiry as to his character and merits; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him *for one year* to be a pilot of any such vessels

within the limit prescribed in the certificate; but the license of any such engineer or pilot may be revoked upon proof of negligence, unskilfulness, or inattention to the duties of the station:"

TENTH. "It shall be unlawful for any person to employ, or any person to serve as engineer or *pilot*, on any such vessel, who is not licensed by the inspectors; and any one so offending shall forfeit one hundred dollars for each offence: *Provided, however*, That if a vessel leaves her port with a complement of engineers and pilots, and on her voyage is deprived of their services, or the services of any of them, without the consent, fault, or collusion of the master, owner, or any one interested in the vessel, the deficiency may be temporarily supplied until others, licensed, can be obtained."

SEC. 38. "And be it further enacted, That all engineers and *pilots* of any such vessel shall, before entering upon their duties, make solemn oath before one of the inspectors herein provided for, to be recorded with the certificate, that he will faithfully and honestly, according to his best skill and judgment, perform all the duties required of him by this act, without concealment or reservation; and if any such engineer, pilot, or any witness summoned under this Act as a witness, shall, when under examination on oath, knowingly and intentionally falsify the truth, such person shall be deemed guilty of perjury, and if convicted be punished accordingly."

SEC. 44. "And be it further enacted, That all parts of laws heretofore made, which are suspended by or are inconsistent with this act, are hereby repealed."

The question arose whether this act superseded or nullified any state pilotage regulations, and it was held by the Supreme Court in 1864 that it did not apply to port pilots or supersede or affect

any state regulations respecting port pilots. Steamship Co. *vs.* Joliffe, 2 Wall., 450.

This case was decided by a vote of four justices to three, the opinion of the majority being written by Mr. Justice Field and the opinion of the minority by Mr. Justice Miller. The opinion of the majority held that the act did not purport to establish regulations for port pilotage or provide for the appointment, duties, responsibilities or compensation of such pilots; that the act was not intended to remedy any evils of the state regulations for port pilotage against which no complaints had been made, and that Congress could not have intended to annul or destroy the state regulations for port pilotage without substituting something in their place. The minority opinion held that the act was broad enough to provide for licensing port pilots as well as pilots for voyages, that the greatest need for pilotage regulation existed at the ports rather than on voyages, that Congress evidently intended that any pilot licensed as provided in the act should be competent to serve within the limits prescribed in his certificate, and that the express provision that "instead of the present system of pilotage the regulations of this act should be observed" clearly intended to abrogate the State systems of pilotage because there were no other systems at that time in existence.

It must be conceded that there was great force in the argument of the minority, and that Congress in passing this act thought that the security of lives of passengers would be better provided for by establishing a system of federal pilots to be examined and licensed by federal authorities, than if vessels were allowed to be piloted exclusively by State pilots and that there could have been no purpose in making any provision for federal pilots if there had been no complaint or ground for criticism of the State pilots.

This apparently was the view taken by Congress, because on July 25, 1866, it passed another act, entitled "An Act further to provide for the safety of the lives of passengers on board vessels propelled in whole or in part by steam, to regulate the salaries of steamboat inspectors and for other purposes," which contained the following provision not appearing in any previous act:

> SEC. 9. "And be it further enacted, That all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States, except vessels subject to the jurisdiction of a foreign power and engaged in foreign trade and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall also be subject to all rules and regulations consistent therewith, established for the government of steam vessels in passing, as provided in the twenty-ninth section of an act relating to steam vessels, approved the thirtieth day of August, eighteen hundred and fifty-two. *And every seagoing steam vessel now subject or hereby made subject to the navigation laws of the United States and to the rules and regulations aforesaid, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels;* vessels of other countries and public vessels of the United States only excepted."

The effect of this section was to place every seagoing steam vessel subject to the navigation laws of the United States and subject to the rules and regulations mentioned, when under way, except upon the high seas, under the exclusive control and direction of Federal pilots, and to wholly exclude State pilots from navigating any vessel of the class mentioned, except upon the high seas. This prac-

tically annulled and destroyed all State regulations and systems respecting port pilotage unless all State pilots obtained licenses from the Federal authorities. This must have caused great consternation among the State pilots, and State authorities generally, and undoubtedly worked considerable injustice, and caused inconveniences in navigation. If this act had remained in force it would have been necessary for the existing pilotage establishments of the various ports to change in substance from State establishments to Federal establishments, although there were no Federal laws expressly providing for such establishments. The burden would have been cast upon the pilots themselves of organizing in such a way as to furnish the necessary service and meet the expenses of maintaining the establishment in addition to obtaining Federal licenses.

These difficulties were evidently brought to the attention of Congress, because on February 25, 1867, it passed an act to amend § 9 of the Act of July 25, 1866, so as to add at the end thereof the following:

> "Provided, however, that nothing in this act or in the act of which it is amendatory shall be construed to annul or affect any regulation established by the EXISTING law of any state requiring vessels entering or leaving a port in such state to take a pilot duly licensed or authorized by the laws of such state or of a state situate upon the waters of the same port." (14 Stats. at Large, page 411.)

This reinstated the pilotage laws of the States which then existed, but did not permit the States to pass any new laws or make any changes in or additions to existing laws. The statutes remained in this form until February 28, 1871, when Congress passed another act entitled "An Act to pro-

vide for the better security of life on board vessels propelled in whole or in part by steam, and for other purposes," which contained among others the following sections:

"SEC. 14. And be it further enacted, That the inspectors shall license and classify the captains, chief mates, engineers, and pilots of all steam-vessels, and it shall be unlawful to employ any person, or for any person to serve as a captain, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and anyone so offending shall forfeit one hundred dollars for each offence; and no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of officers and crew, sufficient at all times to manage the vessel, including the proper number of watchmen: *Provided, however*, That if any such vessel, on her voyage, is deprived of the services of any licensed officer, without the consent, fault, or collusion of the master, owner, or of any person interested in the vessel, the deficiency may be temporarily supplied until others licensed can be obtained."

"SEC. 18. And be it further enacted, That whenever any person claiming to be a skillful pilot of steam-vessels shall offer himself for a license, the inspector (s) shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he shall offer, that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, or inattention to the duties of his station, or for intemperance, or the wilful violation of any provision of this act. And every such captain, mate, engineer, and pilot who shall receive a license

as aforesaid shall, when employed upon any such vessel, place his certificate of license (which shall be framed under glass) in some conspicuous place in such vessel, where it can be seen by passengers and others at all times; and for every neglect to comply with this provision by any such captain, mate, engineer, or pilot, he shall be subject to a penalty of one hundred dollars' fine, or to the revocation of his license: *Provided*, That in cases where the captain or mate is also pilot of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face that he is authorized to act in such double capactiy."

"Sec. 41. And be it further enacted, That all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation, shall be subject to the provisions of this act: *Provided*, That this act shall not apply to public vessels of the United States or vessels of other countries, nor to boats, propelled in whole or in part by steam, for navigating canals."

"Sec. 51. And be it further enacted, That all *coastwise* seagoing vessels, and vessels(s) navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this act; and every *coastwise* seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, *not sailing under register*, shall when under way, except on the high seas, be under the control and direction of pilots

licensed by the inspectors of steamboats. *And no State or municipal government shall impose upon pilots of steam vessels herein provided for any obligation to procure a State or other license in addition to that issued by the United States, nor other regulation which will impede such pilots in the performance of their duties, as required by this act; nor shall any pilot charges be levied by any such authority upon any steamer piloted as herein provided, and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the State where the same is performed: Provided, however,* That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, *other than coastwise steam vessels,* to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

The provisions for the examination and licensing of pilots continued in substantially the same form as they had previously existed, and Congress still expressly retained its jurisdiction and control over all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors and other navigable waters of the United States, excepting only public vessels of the United States, vessels of foreign countries and boats propelled in whole or in part by steam for navigating canals.

Section 51 of this act corresponds to Section 9 of the Act of 1866 as amended in 1867, with certain modifications. The portions printed above in italics are new. In this section appears for the first time the expression "all coastwise seagoing vessels." This expression was evidently intended to include all seagoing vessels navigating the lakes, bays, inlets, sounds, rivers, harbors or other navi-

gable waters of the United States, and also all vessels sailing up and down either the Atlantic or Pacific Coast of the United States.

Section 51 of this act limits the class of vessels placed under the exclusive control and direction of Federal pilots.

Under the Act of 1866, as amended in 1867, every seagoing vessel subject to the Navigation Laws of the United States and to the rules and regulations mentioned, was placed under the control and direction of Federal pilots when under way, except upon the high seas, whereas Section 51 of the Act of 1871 places under the exclusive control of the Federal pilots only those seagoing steam vessels, subject to the Navigation Laws of the United States, and the rules and regulations mentioned, which are coastwise steam vessels, and are not sailing under register.

The provisions in Section 51 of the Act of 1871, that no State or municipal government should impose upon Federal pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States, and that no State should levy any pilot charge upon any steamer piloted as therein provided, were new, and had not appeared in any previous act. The latter provision was doubtless deemed necessary in view of the fact that certain classes of seagoing steam vessels which had previously been placed under the exclusive control of Federal pilots, were, by Section 51, removed and released from such *exclusive* control.

The proviso at the end of §51 differs from the corresponding proviso in the Act of 1866 inserted in §9 by the Amendatory Act of 1867, in that it omits the word "existing" before the words "laws of any State," and that it inserts the words "other than coastwise steam vessels" between the words "such State" and the words "to take a pilot." The

effect of this change was to permit the States to pass new laws or to change or add to their old laws requiring vessels entering or leaving port to take a State pilot, but it limited the scope of such laws, both those then existing and those which might thereafter be enacted, so that they should not apply to coastwise steam vessels.

Although the Act of 1871 expressly repeals the previous acts relating to the same subject-matter, it must be construed in the light of the old acts and as a continuance and modification or amendment thereof rather than as an entirely new enactment. For this reason §51 should not be held to change the law as it previously existed except insofar as the intention to make such changes clearly appears.

§51 should also be construed so as to give to all parts and provisions thereof some reasonable meaning and effect. The section should not be construed to enlarge the powers of the states to regulate pilotage any further than appears to have been clearly intended.

The fact that seagoing steam vessels are withdrawn from the *exclusive* control of federal pilots, if they are not coastwise or are sailing under register, should not be construed to give to the states *exclusive* power to regulate pilotage on such vessels unless that appears clearly to be the intention. It was clearly the intention of this act to give to the states power to compel vessels other than coastwise steam vessels to take a state pilot when entering or leaving port, but we submit it was not the intention of this act to give to the states a similar control over any coastwise steam vessels whether sailing under register or not.

As vessels sailing under register have since 1818 been expressly authorized to engage in trade between different ports of the United States (9 Stats. at Large 232; R. S., §3126), which must

include coasting trade, it is evident that Congress contemplated that some coastwise steam vessels might sail under register, and that others might sail under license, and that as licensed vessels could not engage in foreign trade it intended to retain under the exclusive control of federal pilots all licensed seagoing steam vessels except when on the high seas. Having provided, however, for the examination and licensing of pilots who should be competent to safely pilot steam vessels in and out of ports, and having placed a certain class of steam vessels under their exclusive control and direction for the purpose of better securing the life of passengers, Congress must have contemplated that in piloting other coastwise steam vessels in and out of port, which were sailing under register, the federal pilots would be equally competent, if not more competent, to promote the safety of life than state pilots. There is no reason to infer from the fact that Congress has removed coastwise steam vessels sailing under register from the *exclusive* control and direction of federal pilots that it has lost in any degree its confidence in the ability or competency of such pilots, or that such pilots are any less competent to navigate steam vessels sailing under register than steam vessels sailing under license when both are engaged in coastwise trade.

This view is confirmed and affirmatively expressed in the provisions of § 51 which prohibit the states from requiring any federal pilots to procure a state license, and from levying any pilot charges upon any steamer piloted as therein provided. The expression "piloted as herein provided" must mean piloted as provided in the Act of 1871 rather than as provided in § 51 of that act. There is no provision in § 51 for the examination or licensing of pilots. The provision for their examination and licensing appear in the preceding sections of the acts. Piloted as provided in

the Act of 1871 must mean piloted by a pilot who has been examined and licensed by Inspectors of Steamboats as provided therein. This construction is wholly reasonable and consistent with the other provisions of the statute, and it is in line with the obvious intention of Congress that the security of life would be promoted by the use of federal pilots in preference to state pilots. If a coastwise vessel sailing under register is under the control and direction of a federal pilot licensed to navigate in a particular port, how can it be possible that the security of life would be promoted in any way by compelling that vessel to take on a state pilot and submit itself to his control and direction? Congress having provided for the examination and licensing of federal pilots for the purpose of navigating steam vessels in and out of harbors, must have intended that their ability to perform this service would be at least equal to the ability of state pilots to perform the same service, and there is no reason for imputing to Congress an intention to permit a state to require the use of state pilots in preference to federal pilots licensed for the same service unless such an intention is clearly shown.

It may be asked however why Congress removed coastwise steam vessels sailing under register from the exclusive control and direction of Federal pilots. The answer is simple. In the first place the majority of such vessels would have occasion to stop for one purpose or another at foreign ports where they necessarily could not be under the control or direction of Federal pilots. In the second place the coastwise steam vessels which are engaged in the longest voyages are more likely to be registered than licensed, because of the greater chances of being obliged to stop at foreign ports, and on the longer voyages there is less chance that the pilot will hold Federal licenses for all ports at which the vessel may stop, and much greater chance

that the vessel will require the service of some local pilot when entering port. A pilot who could safely navigate a vessel in and out of the port of San Francisco would not be expected to have a license for the port of New York, although he might well be competent for other ports on the Pacific coast. The result is that if Congress had made the use of Federal pilots compulsory for all coastwise vessels sailing under register without creating a Federal establishment for port pilots, many of such vessels would have been forced to make special arrangements in advance with some local Federal pilot to meet them and safely take them into port.

It is accordingly clear that if the requirement that vessels must be under the control and direction of Federal pilots had remained broad enough to include coastwise steam vessels sailing under register and making the longer voyages, it would have subjected such vessels to considerable inconvenience and would have interfered unreasonably with navigation, not because any pilot holding a Federal license for any particular port would not be just as competent as a State pilot to take the vessel safely into that particular port, but because of the probabililty that such a vessel would not, upon reaching the port, have on board a pilot who held a Federal license for every port which it desired to enter, and that it would have greater difficulty in obtaining locally a Federal pilot than a State pilot when it actually arrived at and was ready to enter any port. This results from the fact that there have never been any local Federal establishments for port pilotage, and not because a Federal pilot holding a license for a particular port is not just as competent as a State pilot to safely navigate vessels therein. If any vessel had on board when arriving at any port a Federal pilot holding a license for

that port, Congress could not have intended that such a vessel could be required by any State to take a State pilot or pay any State pilot charge. The presumption is strongly against any such intention unless it is clearly shown.

We have already seen that the proviso clause added in 1867 to §9 of the Act of 1866 had substantially the effect of conferring back upon the states certain powers which had previously been taken away from the states, but only to the extent of existing statutes. The proviso clause of §51 is in effect an amendment or modification of the same clause of §9 of the Act of 1866. It had the effect of conferring back upon the states certain additional powers which had previously been taken away from them, to wit, the powers to enact new laws or change or modify their old laws requiring vessels other than coastwise steam vessels, when entering or leaving port, to take a state pilot. This clause cannot possibly be construed to confer upon the states any greater powers than are expressly mentioned. The section should be construed strictly against the states. The expression "coastwise steam vessels" cannot be limited for the benefit of the states because no limit is stated, and there is no reason for inferring that this expression means "coastwise steam vessels not sailing under register" because of the fact that the expression when used above in the same section had this limitation. In the first place the expression "coastwise seagoing vessels" appears in the first and second lines of the section without the limitation mentioned, and in the second place the fact that in one case Congress placed this limitation on the expression, whereas in the other case it did not do so, gives rise to the inference that Congress did not intend in the second case that it should be limited.

The provisions of the Act of February 28, 1871,

were codified in Revised Statutes, Title 52. The important sections are as follows:

> Rev. Stat. "Sec. 4401. All coastwise seagoing vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this Title; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, excepting on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."
>
> Rev. Stat. "Sec. 4412. Whenever any person claiming to be a skillful pilot of steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this Title."
>
> Rev. Stat. "Sec. 4413. Where the master or mate is also pilot of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face that he is authorized to act in such double capacity."

> Rev. Stat. "Sec. 4444. No State or municipal government shall impose upon pilots of steam-vessels any obligation to procure a State or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this Title; nor shall any pilot-charges be levied by any such authority upon any steamer piloted as provided *by this Title;* and in no case shall the fees charged for the pilotage of any steam-vessel exceed the customary or legally established rates in the State where the same is performed. Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any State, requiring vessels entering or leaving a port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State."

There is no substantial change between these provisions and the corresponding provisions in the Statute of 1871 if construed as we have contended. The provision in Section 4444 that no pilot charges shall be levied by any state "upon any steamer piloted as provided by this title" emphasizes and establishes our contention that the corresponding provision in Section 51 of the Act of 1871 was intended to prohibit the states from levying pilot charges upon steamers piloted by a pilot licensed as provided in the Act of 1871. If this prohibition were intended to apply only to steamers upon which federal pilotage was made compulsory, the prohibition in Section 4444 would undoubtedly have referred specifically to Section 4401 instead of to Title 52 generally. Any steamer is certainly piloted as provided in Title 52 if it is at the time under the control and direction of a pilot licensed by the federal authorities for the

particular voyage or port on or in which the steamer is sailing. This does not, we contend, change the meaning of the law, because the expression in Section 51 of the Act of 1871, "piloted as herein provided," clearly meant piloted as provided in the entire Act of 1871.

It is further significant that Section 4444 is entitled "State Regulation of Pilots" and that the provisions for the state regulation of pilots are contained in a section all by themselves. From this it may reasonably be inferred that Congress regarded that the states have no power to regulate pilots, except as provided in that section.

The appellants' contention that Congress intended to assume control over the pilotage of only licensed steam vessels and to leave the pilotage of all registered steam vessels for the several states to regulate, cannot be sustained without doing violence to certain provisions of Section 4444 and rendering nugatory and meaningless certain other provisions of that section. If Congress had intended to accomplish the result suggested by appellants, why didn't it say so? It would have been simple for Congress in 1871 or when codifying the laws into the Revised Statutes to say, if it had intended or desired to do so, that all steam vessels sailing under license should be under the control and direction of federal pilots, except when on the high seas, and that all other vessels should be subject to such pilotage regulations as the several states might adopt. The failure to accomplish a simple thing in a simple manner indicates clearly that it was not intended.

Ryan *v.* Carter, 93 U. S., 78, 83.
U. S. *v.* Ryder, 110 U. S., 739.
U. S. *v.* Chase, 135 U. S., 259.

Furthermore, the appellants' argument leads to an unreasonable and absurd result. If his conten-

tion was sustained, it would mean that a steam vessel sailing regularly between New York and Galveston without stopping *en route* at a foreign port would be subject exclusively to control by federal pilots when entering or leaving port, but that another steam vessel making substantially the same trip, which stopped regularly *en route* at some port or ports in the West Indies, would be subject exclusively to the control of state pilots when entering or leaving port. Such a distinction is certainly not necessary for the better security of the life of passengers, and Congress could not have intended such a result after making elaborate provision for examining and licensing pilots for service in the various ports, as well as for service on voyages.

It is obvious that the distinction which Congress had in mind was that between coastwise steam vessels and other vessels, and that it intended to place coastwise vessels under the control and direction of federal pilots in so far as it might be practicable and convenient in view of the customs and necessities of navigation, and that it did not intend that the power of the state to regulate the pilotage of any particular vessel should depend upon whether it was sailing under register or under license. Such a distinction would obviously be unreasonable because a vessel sailing under register might, and a great many of them undoubtedly do, engage in exactly the same trade as vessels sailing under license. The inclination of Congress to classify coastwise vessels sailing under register with coastwise vessels sailing under license is clearly indicated by Section 4361 of the Revised Statutes, which is a re-enactment with slight changes of Section 20 of Chapter 8 of an Act of February 18, 1793, 1 Stats. at Large 313, which makes vessels registered and employed in going from one dis-

trict in the United States to another district subject to the same regulations, provisions, penalties and forfeitures as are provided for vessels licensed for carrying on the coasting trade. This section as appearing in the Revised Statutes might well be held to place coastwise steam vessels sailing under register under the control and direction of federal pilots, except when on the high seas, if construed in such a way as to harmonize with Section 4401. This view was approved by Judge Ross in writing the prevailing opinion of the Circuit Court of Appeals in the present case in 186 Fed. Rep. 730. Such a construction would, however, render nugatory the words "not sailing under register" appearing in Section 4401. There can be no doubt, however, that Congress did not intend that the class of vessels described in Section 4361 should be subject to any pilot charges or other pilotage regulation by the states so long as there were piloted by Federal pilots.

None of the authorities relied on by the appellants are in conflict with our contentions.

In *Joslyn* v. *Nickerson*, it was held that a steam vessel sailing under register between Boston and Havana was not required by the statutes of Massachusetts to take a state pilot because that statute exempted steam vessels carrying a pilot licensed by the federal authorities and the steam vessel in question did carry such a pilot. This vessel was not a coastwise steam vessel at the time of the decision, because Cuba at that time (1880) was a foreign country. The dictum that a federal pilot was not compulsory except upon coastwise steam vessels not sailing under register was undoubtedly correct, but the dictum that the vessel would be bound by any law of Massachusetts which might require her to take a local pilot is, we submit, not correct. It was wholly unnecessary for the

decision of that case and the question was not carefully considered.

The case of *Murray* v. *Clark*, 4 Daly, 468; 58 N. Y., 684, is not entitled to any weight upon the question now at issue, because the court evidently gave no consideration to the history of the legislation of Congress upon the subject of pilotage and the attitude of the State Court was obviously to sustain the state statutes.

In Sprague *v.* Thompson, 118 U. S., 90, it was held that a coastwise steam vessel sailing under license engaged in trade between Philadelphia and Savannah was not bound by a statute of Georgia requiring vessels when entering the port of Savannah to accept the first pilot who offered his services, because at the time of the offer she was piloted as provided by Title 52 of the Revised Statutes. In this case the steamer was at the time of the offer of the first pilot's services on the high seas and under the control of a federal pilot licensed for the high seas, but before she entered the port she took on another federal pilot licensed for the port of Savannah. She was accordingly at all times piloted by a pilot licensed by the federal authorities for waters on which she was actually sailing. This decision sustains the construction of the prohibition contained in Section 4444 against States levying pilot charges upon vessels piloted as provided in Title 52, for which we have contended. The Court said:

> "The section (to wit, Section 4444) expressly excepts coastwise steam vessels from regulations established by the laws of any state requiring vessels entering or leaving a port in any such state to take a pilot * * * The owners of the Saxon were therefore at liberty to employ any pilot licensed under the authority of the United States for the particular service in which he was engaged, without regard to the provisions of the

> Georgia Code requiring it to accept the services of the pilot first tendered, or in case of refusal to pay pilotage therefor."

In Bigley *v.* Steamship Co., 105 Fed. Rep., 74, and Huns *v.* Steamship Co., 182 U. S., 392, it was merely held that a steamer sailing between New York and Porto Rico, after the treaty with Spain, was engaged in coasting trade and a coastwise steam vessel not sailing under register, and that it was exempted from State pilotage regulation. The Supreme Court, after quoting Sections 4235, 4237, 4401 and 4444 of the Revised Statutes, said:

> "The chief object of these provisions seems to be to license pilots upon steam vessels engaged in coastwise or interior commerce of the country and at the same time to leave to the states the regulation of pilots upon all vessels engaged in foreign commerce."

This confirms the contention that Congress considered federal pilots adequate and competent for all coastwise steam vessels, regardless of whether they were sailing under register or under license.

In Olsen *v.* Smith, 195 U. S., 332, the Supreme Court clearly indicated on page 343 that Section 4444 had the effect of exempting and withdrawing all coastwise steam vessels from state pilotage regulations.

POINT II.

The steamers "Queen" and "Umatilla" are coastwise steam vessels, and were at the times mentioned in the certificate piloted as provided in Title 52 of the Revised Statutes, and accordingly not subject to the pilot charges levied by the California Act of 1905.

The certificate of the Circuit Court of Appeals states that the Steamers *Queen* and *Umatilla* were regularly sailing under register, and were either on a voyage from the Port of San Francisco to a United States port on Puget Sound, or from a United States port on Puget Sound to the Port of San Francisco, but that in either such case the steamers did, while en route between said ports of the United States, stop at the Port of Victoria, B. C., and that they carried, delivered and received passengers, mail and freight to and from the Port of Victoria; that the steamers sailed direct to Victoria from San Francisco and direct from Victoria to San Francisco; that at least ninety per cent. of the passengers and cargo of these steamers was carried between United States ports, and that the voyages for which the steamers cleared were between San Francisco and Puget Sound ports of the United States, or *vice versa*, with the right to stop and trade en route at Victoria; and that the stop at Victoria on each occasion was for about an hour (pp. 1 and 2). The same facts are assumed in the Fourth Question certified. The First and Second Questions certified, as well as the opinions of the Judges of the Court of Appeals, seem to assume that the steamers *Queen* and *Umatilla* were coast-

wise steam vessels. The appellants, however, apparently contend, in their Fifth Point, that these steamers were not coastwise steam vesels, because they stopped at and were to some extent engaged in trade with the foreign port of Victoria.

This contention is somewhat surprising, in view of the fact that the appellants have, all through the early part of their brief, referred to the long voyages which coastwise vessels sailing under register might make, and to the fact that they might have occasion to stop at and might incidentally engage in trade with foreign ports. Appellants clearly recognize, in the earlier pages of their brief, that many coastwise vessels sail under register for the express purpose of being able to stop at foreign ports, and that they are no less coastwise vessels because of the fact that they do stop and incidentally trade at foreign ports. Appellants go so far as to say that the trade between San Francisco and New York is coastwise trade, even though vessels engaged in it are obliged to go around South America and pass along the coast of many foreign countries, and must necessarily stop at foreign ports on the way (pp. 6, 12-16). They refer specifically to an Act of Congress of March 28, 1854, Chap. 30; 10 Stats. at Large, 272; R. S. Sec. 2999; which referred to trade between ports of the United States on the Pacific and the Atlantic by the Panama Railway as coastwise trade. Other statutes might be referred to in which Congress has recognized that trade between United States ports and ports of Alaska, Hawaii and Porto Rico is coastwise trade, as distinguished from foreign trade (R. S., Sec. 4358; 31 Stats. at Large, 79; 141-161). Vessels engaged in making voyages to and trading with Alaska, Hawaii and Porto Rico are held to be coastwise vessels within the meaning of Section 4444. *Huus* v. *Steamship Company*, 105 Fed. Rep., 74; 182 U. S., 392.

Both Congress and the Courts have shown an inclination to give to coastwise trade and coastwise vessels a broad interpretation. Coastwise trade and coastwise vessels would, in their ordinary and primary meaning, include trade along a coast, and vessels making voyages along a coast, but Congress and the Courts have gone further, and apparently held that coastwise trade and coastwise vessels include trade between and vessels making voyages between any two American ports, even though the trade and voyages be not strictly along the coast. This extension of the meaning of the expressions cannot, however, be held to deprive them of their natural and ordinary meaning. Vessels making voyages along the coast of the United States between ports of the United States are certainly coastwise vessels.

Even while contending that the steamers in question are not coastwise vessels, appellants state that "it is the character of the *voyage* and not the *cargo* that determines the meaning of the phrase "*coastwise vessels*" in R. S., 4414" (Appellants' Brief, p. 43, top). With this statement, we agree to the extent that the character of the voyage is vastly more important than the character of the cargo. In other words, the controlling consideration is whether the voyage is a coastwise voyage; whether it begins and ends at ports of the United States, and whether it is along the coast of the United States. If the voyage begins and ends at ports of the United States, and is wholly along the coast of the United States, the vessel engaged in it is certainly a coastwise vessel beyond peradventure of doubt, regardless of the character or nationality of the cargo and passengers.

The certificate states and the questions certified assume that the stops made at and the trade with Victoria were en route, and only incidental to the voyages and trade of the steamers between San

Francisco and Puget Sound ports of the United States. The Puget Sound ports referred to undoubtedly include Port Townsend, Seattle and Tacoma. A reference to the map shows that this voyage, from start to finish, was along the coast of the United States, partly on the high seas and partly through inland waters, and that Victoria was directly on the way; that it was unnecessary for these steamers to pass more than a few miles out of a straight course in order to stop at Victoria; and that this port could not on any theory either of fact or at law be regarded as the beginning or ending of the voyage. These steamers, when leaving San Francisco, cleared for ports on Puget Sound, which was proper and natural, because these ports were the natural terminus of the contemplated voyage. When they left Puget Sound ports they cleared for San Francisco, which was natural and proper for the same reason. These voyages were typical coastwise voyages.

The coasting trade includes trade between any two places in the United States, whether on the seacoast or on a navigable river.

Gibbons *v.* Ogden, 9 Wheaton, 214.
Steamboat Co. *v.* Livingston, 3 Cowan, 747.
Ravesies *v.* U. S., Circuit Court, Ala., 1889, 37 Fed. Rep., 447.

The fact that not more than one-tenth of the passengers and cargo of these steamers was carried to and from Victoria precludes the possibility of an argument that because these vessels were engaged to some extent in trade with a foreign port they are not coastwise vessels. Practically all of their trade was with domestic ports, which is enough to make them coastwise vessels even if the character or nationality of the cargo or passengers has any bearing on the question. The important

point, however, is that the stops and trading at Victoria were purely incidental to the voyages and trade between ports of the United States, which was the dominating and controlling purpose of the voyages.

The certificate states, and the questions certified assume, that the steamers *Queen* and *Umatilla* were, when entering and leaving the Port of San Francisco, in fact piloted by an officer holding a federal pilot's license. This must be considered to mean a license for the Port of San Francisco. These facts are sufficient to bring the California Statute of 1905 within the prohibition contained in Section 4444. The California Statute in question is of exactly the kind and character contemplated by and intended to be condemned by this prohibition. Nor does the statute fall within the proviso at the end of Section 4444. The statute does not require any vessel "to take a pilot," but it does levy pilot charges. This statute is accordingly not only void when applied to coastwise vessels piloted by an officer holding a federal pilot's license, but it is void even when applied to vessels other than coastwise, because it does not require such vessels "to take a pilot." The prohibition was directed against the levy of pilot charges by any State *upon any steamer* piloted as provided in Title 52. The proviso qualified this prohibition only to the extent of permitting States to require vessels other than coastwise steam vessels to take a State pilot. The result is that any statute of a State which levies a pilot charge but does not require a vessel to take a pilot is void as applied to any steamer piloted at the time by a federal pilot. The California Statute was not in existence in 1867, and accordingly the power of the State to pass it depends entirely upon the proviso clause in Section 4444, which must be construed strictly against the State, because it has the practical effect of conferring power

upon rather than taking power away from the States.

The unreasonableness and absurdity of the appellants' argument appears, when we realize that if the steamers *Queen* and *Umatilla* did not stop at Victoria in the course of their voyages between San Francisco and Puget Sound ports, they could unquestionably be piloted in and out of the Port of San Francisco by Federal pilots. How can the question whether they stop or not at Victoria have any bearing whatever upon the ability or competency of the officers of these steamers, who hold Federal pilots' licenses, to pilot them in and out of the Port of San Francisco? How can it be assumed, even for a moment, that Congress would have intended such an insignificant fact to determine whether a vessel should be piloted by a Federal or State pilot?

POINT III.

The First, Second and Fourth Questions Certified should be answered in the affirmative.

If our contentions made in Point I of this brief are sustained, it is clear that the First and Second Questions Certified must be answered in the affirmative. If our contentions made in Point II of this brief are sustained, the Fourth Question Certified must be answered in the affirmative.

POINT IV.

The Third Question Certified cannot be answered in the affirmative or the negative.

This question is, in effect, Are registered steam vessels, engaged in commerce with both foreign and domestic ports on the same voyage, coastwise vessels? The answer to the question whether a vessel is a coastwise vessel or not obviously depends upon other considerations than the question whether it is engaged in foreign as well as domestic commerce. The fact that it is engaged to some extent in foreign commerce does not prevent a vessel from being a coastwise vessel, and the fact that it is engaged to some extent in domestic commerce does not necessarily make it a coastwise vessel. For instance, a steamer sailing from New York to Liverpool, which stopped at Boston on the way, might be engaged in domestic commerce to a certain extent, but it would certainly not be a coastwise vessel, because its real voyage and its principal business would be between New York and a foreign port.

We, accordingly, do not see how it is possible to answer the Third Question Certified either in the affirmative or the negative, because the facts assumed are insufficient to determine the question.

Respectfully submitted,

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IN THE

Supreme Court of the ~~United States.~~

No. 641.

M. ANDERSON, *Appellant,*

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION) CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, *Appellee.*

No. 642.

N. JORDAN, *Appellant,*

vs.

THE PACIFIC COAST COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, *Appellee.*

SUPPLEMENTAL BRIEF FOR APPELLEES.

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IN THE

Supreme Court of the United States.

M. ANDERSON, Appellant, vs. THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship *Queen*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellee.	No. 641.
N. JORDAN, Appellant, vs. THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship *Umatilla*, her Engines, Boilers, Machinery, Tackle, Apparel and Furniture, Appellee.	No. 642.

SUPPLEMENTAL BRIEF FOR APPELLEES.

We have just received the appellants' reply brief and fear that we have failed to express clearly in our main brief or the oral argument certain of

the contentions which we desire to make. We accordingly wish to avail ourselves of the permission of the Court to file an additional brief. We repeat herein the substance of certain arguments contained in our main brief, but cannot of course attempt to cover all the points mentioned therein.

The four questions certified by the Circuit Court of Appeals involve the construction of §§ 4401 and 4444 of the Revised Statutes. Two questions are raised: First, whether the expression "coastwise vessels" appearing in these sections means (*a*) only vessels licensed for and engaged exclusively in the coasting trade, or (*b*) vessels engaged exclusively in the coasting trade, whether licensed or registered, or (*c*) vessels engaged in making coastwise voyages, whether licensed or registered, even though they stop en route and trade incidentally at foreign ports; and Second, whether the States have power to regulate the pilotage of any coastwise vessels.

We have contended that the expression "coastwise vessels" appearing in these two sections means vessels engaged in making coastwise voyages, and that a voyage from one port to another of the United States is a coastwise voyage, even though the vessel stops en route and trades incidentally at a foreign port, and that the States have no power to regulate the pilotage of any such vessels if they are in fact piloted by Federal pilots. We base this contention first upon the proposition that no other construction would give a reasonable or intelligent meaning and effect to all the provisions of §§ 4401 and 4444, and second, upon the proposition that, in view of the history of the legislation of Congress upon the subject of pilotage, it should be held that the States have no power to regulate port pilotage of any seagoing vessels subject to the navigation laws of the United States except as provided by § 4444, expressly or by necessary implication.

The appellants, however, contend that the States have power to regulate the port pilotage of all vessels except as provided by § 51 of the Act of 1871, and that the only limitation upon the power of the States is with respect to "coastwise steam vessels, not sailing under register" or steam vessels licensed for and engaged exclusively in the coasting trade. They contend that the States can regulate the port pilotage of all registered vessels.

We contend that the same result should be reached whether the argument be based upon § 4401 and § 4444 as they now appear in the Revised Statutes, or upon § 51 of the Act of 1871.

The expression "coastwise vessels" appears three times in § 51 of the Act of 1871, which provides in substance first, that *all* coastwise seagoing vessels and vessels navigating the Great Lakes shall be subject to the navigation laws of the United States; second, that every coastwise seagoing *steam* vessel subject to the navigation laws of the United States, *not sailing under register*, shall when under way, except on the high seas, be under the control and direction of federal pilots; and, third, that the States may require vessels, other than coastwise *steam* vessels, to take a state pilot when entering or leaving port.

On the first occasion where this expression is used it must include *all* coastwise seagoing vessels, whether registered or licensed, and whether they are steam vessels or sailing vessels. No reason can be suggested for limiting this expression to those vessels only which are licensed and are not registered. It would be wholly unreasonable to suppose that Congress did not intend to make registered as well as licensed vessels subject to the navigation laws of the United States when navigating within the jurisdiction thereof. Section 11 of the Act of 1871 shows that all steam vessels navigating waters over which the United States has

jurisdiction were intended to be subject to the provisions of the Act, with the exception of public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals.

On the second occasion where this expression is used it is limited to coastwise vessels which are *steam* vessels, as distinguished from sailing vessels, and which are *not sailing under register*. The class of vessels which is placed under the exclusive control of federal pilots, except when on the high seas, is accordingly much narrower than the class of vessels which is made subject to the navigation laws of the United States. The vessels navigating the Great Lakes are made subject to the navigation laws, but are not placed under the exclusive control of federal pilots.

On the third occasion where this expression is used it is limited only to *steam* vessels. The expression "coastwise steam vessels" in the latter part of § 51, clearly does not include sailing vessels, but clearly does include all other coastwise vessels which are included in the first clause of the section.

It cannot be presumed that Congress, when using this expression three times in the same section of an Act, on some occasions with limitations, and on other occasions without limitations, intended that any limitations not expressed should be supplied by inference.

These circumstances show that Congress contemplated that some coastwise vessels might be registered, and that others might be licensed. The same thing is shown by § 3126 enacted May 27, 1848 (9 Stats. at Large, 232) which authorizes any *registered* vessel to engage in trade between ports of the United States; by § 1220, enacted July, 1870 (16 Stats. at Large, 269), which provides that certain vessels trading between ports of the United

States shall not be subject to tonnage tax or duty if they are licensed, *registered* or enrolled; by § 4361, enacted February 18, 1793 (1 Stats. at Large, 313) which provides that *registered* vessels employed in going from one district to another in the United States shall be subject to the same regulations, provisions, etc., as are provided for vessels licensed for carrying on coasting trade. The substance of these three sections were in force as laws of the United States at the time of the enactment of the Act of 1871, and must be taken into consideration when considering the meaning of the expression "coastwise vessels" appearing in § 51 of the latter act.

Congress has repeatedly recognized that coastwise vessels may stop incidentally and trade at foreign ports, and that if such stops and such trade are en route or incidental to a voyage between ports of the United States the vessels are nevertheless coastwise vessels. § 3126 authorizes *registered* vessels to engage in trade between ports of the United States "with the privilege of touching at one or more foreign port *during the voyage*" and to "land and take in thereat merchandise, passengers and their baggage and letters and mails." § 3127, enacted at the same time as § 3126, to wit, May 27, 1818 (9 Stats. at Large, 232) exempts foreign merchandise carried in registered vessels from one port to another of the United States from the payment of import duties, even though the vessels in which they are carried may have "touched at a foreign port *during the voyage*." These sections, as well as § 4361, show clearly the inclination of Congress to classify registered vessels making coastwise voyages, which stop at foreign ports during the voyages, as coastwise vessels, rather than vessels engaged in foreign trade.

§4513, enacted June 7, 1872 (19 Stats. at Large, 261), provides that §4511 relating to shipping

articles shall not apply "to masters of coastwise nor to masters of lake-going vessels that touch at foreign ports." This is an unequivocal declaration by Congress that vessels which touch at foreign ports may, nevertheless, be coastwise vessels.

It has been held by the Supreme Court of Massachusetts, in construing pilotage statutes of that State, that vessels might be "coasters" or might be "engaged regularly in the coasting trade," even though they were sailing under register and were engaged to some extent in trade with foreign ports.

Wilson *v.* Gray, 127 Mass., 98.
Tilley *v.* Farrow, 14 Mass., 17.

See also

Hall *v.* Deenir, 91 U. S., 485.

We contend that the provision in § 4444 to the effect that no pilot charges shall be levied by any State upon any steam vessel piloted as provided in Title 52, means that no such charges shall be levied upon any steamer piloted by a pilot, provided for in Title 52. The pilots provided for in that title are those examined and licensed by the inspectors of steam boats. These inspectors are required by § 4438 to license and qualify pilots of all steam vessels. The same section makes it unlawful to employ any person, or for any person to serve as a pilot of any steamer, who is not licensed by the inspectors. Substantially the same provisions were contained in § 14 of the Act of 1871. §4442, substantially a re-enactment of § 18 of the Act of 1871, authorizes the inspectors to grant to pilots licenses for the term of one year to pilot steam vessels within the limits prescribed in the license. This contemplates that the licenses should be limited both as to time and as to the waters with respect to which the pilots prove themselves to be qualified. A steamer is certainly piloted as provided in Title 52 if it is piloted by a pilot licensed by the in-

spectors of steamboats for the time in which and the particular waters upon which the steamer is sailing.

The result is that coastwise steam vessels when entering or leaving port must be piloted by federal pilots if they are not sailing under register; they may be piloted by such pilots if they are sailing under register, and if they are so piloted they cannot be compelled by the States to pay any pilot charges. It follows by implication that a coastwise steam vessel sailing under register which is not piloted by a federal pilot may be compelled by the State to take a State pilot when entering or leaving port. Vessels other than coastwise steam vessels may be required by the States to take a State pilot when entering or leaving port. This construction gives a reasonable and intelligent meaning to all provisions of the sections in question, and gives to the States such powers with respect to port pilotage as are provided in § 4444, expressly or by necessary implication, and no other powers.

The appellants apparently agree with us with respect to the meaning of the expression "coastwise vessels." They frankly recognize that "coastwise vessels" may be registered and may stop en route and trade incidentally at foreign ports, but contend that Congress intended that Federal pilots should pilot in and out of ports the licensed coastwise vessels, making presumably the shorter voyages, but not the registered coastwise vessels, making presumably the longer voyages (Reply Brief, pp. 6-10). The appellants accordingly contend that States have power to regulate the port pilotage of *some* coastwise vessels, to wit, those sailing under register.

The argument that Congress did not intend that a Federal pilot should pilot a registered vessel in and out of a port after being away some time on a comparatively long voyage is artificial and not sup-

ported by anything in the statutes. The Federal pilots are licensed *for a limited time* and a limited territory and Congress by making the limit *one year* clearly indicated that it was not necessary for pilots to be examined oftener than once a year to make sure that they were familiar with the existing conditions. There is nothing in the statutes to indicate that a pilot holding a license for a particular port should not go away from it for more than a week or a month at a time or that if he did so he would be any less qualified to act as pilot when he came back. So far as anything that Congress has said is concerned he might go away for ten months and still be qualified to act during the other two months of the year. Congress undoubtedly knew of the possibilities of changes in the bars or currents which the appellants refer to, but did not think them of sufficient importance to require the Federal pilots with port licenses to be always at or near the port. If Congress had felt that these possibilities of changes were as dangerous as appellants contend, she would probably have established a system of port pilotage establishments, and certainly would not have made the use of Federal pilots *compulsory* on any coastwise vessels. Those even which do not sail under register, such for instance as the steamers sailing from New York to New Orleans or Galveston, may often be away from any one port a month or more at a time, and yet they are *expressly required* by Congress to use Federal pilots when entering or leaving ports, and are not permitted to accept at such times the services of a State pilot not holding a Federal license.

The appellant's argument cannot be reconciled with the language of § 51 of the Act of 1871, and R. S., §§ 4401 and 4444 except by holding that the States have full power to regulate port pilotage *except as limited* by these sections, that the only limi-

tation applies to "coastwise vessels not sailing under register," and that the proviso at the end of § 51 and § 4444 means nothing at all and is wholly unnecessary. Appellants have failed in their reply brief to suggest any meaning for this proviso. If the words "not sailing under register" were supplied out of the whole cloth to limit the words "coastwise steam vessels" the proviso would be a complement to § 4401, but would still, on appellants' construction, be wholly unnecessary.

The appellants argue that the prohibition against the levy of pilot charges by the States was intended merely to protect the coastwise vessels not sailing under register which were required to have federal pilots. For such a purpose the prohibition was clearly unnecessary because no State could in any way regulate the pilotage of a vessel which was regulated by Congress.

No such prohibition was considered necessary by Congress prior to 1871 when *all* seagoing steam vessels subject to the navigation laws were required to use Federal pilots when entering or leaving ports, except for the laws of the States existing in 1867. This prohibition was inserted in 1871 for a distinct purpose when the class of vessels subject to the *exclusive* control of Federal pilots was limited, and when the States were given power to pass new laws or to amend or modify their old laws so as to require vessels other than "coastwise steam vessels" to take a pilot. This prohibition was inserted to protect the coastwise steam vessels which were sailing under register, and which had Federal pilots for the various ports at which they stopped, from the levy by the States of unnecessary and burdensome charges. It was to protect a class of vessels *not otherwise protected* from such interference by the States. The levy of pilot charges in cases where the services of a pilot are not needed is cer-

tainly a pernicious form of taxation, and practically "graft" for the state pilots, and Congress could reasonably be expected to give protection to all vessels which had licensed and qualified Federal pilots, and did not need the services of any local port pilots.

It must be presumed that Congress intended that pilots licensed by the inspectors of steamboats would be fully competent to pilot vessels during the term and within the limits of their licenses, and that Congress did not intend that any vessel piloted by such a pilot should be subjected to any pilotage regulation by the States, except in cases where Congress has indicated that the States might regulate. There could be no purpose in providing Federal pilots for port work if they were to be superseded by State pilots for the vessels in which Congress was chiefly interested—to wit, coastwise steam vessels. It was this class which Congress had chiefly in mind and to which its regulations, contained in the Act of 1852 and 1871 and Title 52 of the Revised Statutes, chiefly apply.

The appellant's contention that the words "Existing laws" in the proviso of § 9 of the Act of 1866 as amended in 1867 meant laws existing at the time any vessel might be "entering or leaving port" is far-fetched and unsound. Such was not the intention of Congress. It appears that when the amendment of 1867 was before the Senate it was stated by Senator Morgan, who brought up the bill for consideration on February 19, 1867, that the only new provision in it was contained in a proviso at the end of the bill which "exempted from the provisions of the act of last year such States as have pilot laws *already* that are satisfactory."

The Congressional Globe, Second Session, 39th Congress, Part III, page 1554.

This confirms our contention that the effect of the amendment was merely to reinstate the laws of the States which were *then* in existence, and that it did not give back to the States power to pass any new laws or to amend or modify their old laws relating to pilotage.

The appellants misunderstand the point of our argument based upon the history of the legislation of Congress upon the subject of pilotage. We contend that the Act of 1866 superceded all State regulations for port pilotage of seagoing vessels subject to the navigation laws of the United States, that the Amendment of 1867 reinstated the laws of the States *then* existing requiring vessels entering or leaving port to take a State pilot, and that the Act of 1871 enlarged the powers of the States in so far as it authorized them to pass new laws or amend or modify their old laws so as to levy pilot charges upon coastwise steam vessels not piloted by Federal pilots and to compel vessels other than coastwise steam vessels to take a State pilot. This Act of 1871 necessarily superceded and limited any State pilotage laws existing in 1867 which affected coastwise vessels, not sailing under register, or other coastwise vessels piloted by Federal pilots. In so far, however, as this Act permitted new legislation by the States it enlarged their powers and should not be construed to confer any greater powers than are clearly indicated. The Statute of California involved in this case was new legislation because it was passed in 1905.

While it may be true, as a general rule, that Congress cannot confer legislative powers upon the States in view of the fact that the States have all legislative powers which are not limited or conferred exclusively upon Congress by the Constitution, there are many cases in which legislation by Congress has the effect of increasing or diminishing the powers of the States. This happens in cases

like the present, where Congress and the States have concurrent powers of legislation upon the same subject-matter. In such cases the powers of the States are superceded as soon as and to such extent as Congress legislates, but as soon as Congress repeals or limits the scope of its legislation the powers of the States are revived and may be exercised. The State pilotage laws which are superceded by inconsistent acts of Congress lie dormant as long as the acts of Congress are in force. Upon repeal or modification of the acts of Congress the State laws regain *pro tanto* their original force and effect. The China, 7 Wall., 53; *Ex parte* McNeill, 13 Wall., 236; Wilson *v.* McNamee, 102 U. S., 572; Cooley *v.* Portwardens, 12 Wall., 299.

The result is that whenever Congress by amendment of an earlier act limits the scope of its legislation, it indirectly enlarges the scope of the legislation which the States may lawfully enact, and our point is that such an amendment by Congress of an earlier act should be construed to limit the scope of its legislation, and correspondingly increase the scope of the State legislation, only to such extent as Congress indicates clearly or by necessary implication.

It is most important to consider § 51 of the Act of 1871 side by side with § 9 of the Act of 1866 as amended in 1867. The prohibitions contained in § 51, which are italicized on page 17 of our main brief, were clearly inserted because of the fact that the exclusive control of Federal pilots was limited to coastwise steam vessels not sailing under register. These prohibitions were intended to cover coastwise steam vessels sailing under register, and to exempt them from interference by the States so long as they were piloted by Federal pilots, and it was not the intention of Congress to place this class of vessels under the exclusive control of Federal pilots or the exclusive control of State pilots.

It was clearly intended to give to this class of vessels the option to use a Federal or a State pilot, when entering or leaving port, in view of the fact that it would have been unjust to compel them to use a Federal pilot if they did not have one regularly on board, but equally unjust to compel them to use a State pilot or pay unnecessary charges if they did have a Federal pilot on board.

It was suggested by the Chief Justice on the argument that the purpose of the pilotage legislation of Congress was to exempt vessels which were constantly entering and leaving ports of the United States on regular trips whose regular officers were fully competent to pilot them in and out of such ports from accepting the services of local pilots which were wholly unnecessary, or from paying pilot charges without receiving any benefit therefor. We submit that whether the purpose of Congress was to exempt such vessels from the payment of unnecessary pilot charges, or to promote the safety of life, neither purpose can be accomplished by accepting the appellants construction and holding that appellees' steamboats are liable to pay the pilot charges levied by the California statute of 1905 involved in this case.

The steamers *Queen* and *Umatilla* were making regular trips from San Francisco to Puget Sound, and the time consumed in making each trip was less than two weeks (Record, Anderson *v.* Pac. Coast S. S. Co., Schedules B and C, pp. 38 to 52). Each of the masters and first officers of these vessels was duly licensed by the inspectors of steamboats to serve as master and pilot when entering and departing from the port of San Francisco, and each of said masters had for two years or more many times safely, and without the assistance of any state pilot navigated and piloted vessels out of and into the port of San Francisco, and no master

of any vessel owned or employed by either of the appellees and sailing under register had ever, during the period of twenty years, accepted the services of any state pilot to pilot any such vessel out of or into the port of San Francisco (same Record, p. 26). The amount of the pilotage fees which would be payable under the California statute, if valid, would be on an average of $110 per month for the steamer *Queen* and $120 for the steamer *Umatilla* (pp. 28, 29). These steamers had absolutely no use for the services of any State pilots when entering or leaving the port of San Francisco. The California statute permits them to enter and leave port under control of their own officers, if they pay the full State pilot charges. The levy and payment of these charges does not promote the safety of life or accomplish any useful purpose. They merely enrich the State pilots. The appellees' steamers accordingly fall within the class which Congress had in mind and intended to protect from annoying and burdensome interference by the States.

The acts of Congress should not be construed to permit the States to levy such wholly useless and burdensome charges when they are susceptible of a construction which is far more reasonable and just.

It does not appear that the federal pilotage laws have received any construction by conduct or acquiescence which is of assistance in this case. Most of the states except from their own pilotage laws "coasters" or "coastwise vessels." Some of them except "vessels employed in and licensed for the coasting trade." Three of the states seem to recognize that vessels carrying federal pilots are exempted by Congress from state pilotage regulations. Massachusetts excepts from its pilotage laws "steam vessels regulated by the laws of the United States and carrying a pilot commissioned by the United

States Commissioners." (Rev. Stats. of Mass. 1902, Vol. 1, page 609, Chap. 67.) Rhode Island excepts from its pilotage laws "passenger steam vessels regulated by United States laws, and carrying a United States pilot." (Genl. Laws of Rhode Island, 1909, Chap. 143, p. 510.) Virginia excepts from its pilotage laws coasting vessels "having a pilot license," which presumably means a federal pilot's license. (Code of Va., 1904, §1965.)

We have made diligent inquiry but have not been able to find that there is any line of steamers which are now sailing under register on voyages analogous to those made by the appellees' steamers. There are no other steam vessels engaged in the coasting trade touching en route at a foreign port and sailing under register out of or into the port of San Francisco. (See record Anderson *v.* Pacific Coast SS. Co., pp. 27, 28.) This explains why the questions raised in this case have not been raised before, and it is not fair to infer that steamship companies situated like the appellees' have in the past acquiesced in or submitted to state pilotage regulations similar to those now existing in California. We have looked into this matter because of a question asked on the argument by one of the members of the Court.

Respectfully submitted,

GEORGE W. TOWLE,
Proctor for Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
THOMAS D. THACHER and
LELAND B. DUER, of Counsel.

No.

In the Supreme Court

OF THE

United States.

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen," her tackle, apparel, etc.,
Petitioner,

vs.

M. ANDERSON, Libelant of said S. S. "Queen," etc.,
Respondent.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla," her tackle, apparel, etc.,
Petitioner,

vs.

N. JORDAN, Libelant of said S. S. "Umatilla," etc.,
Respondent.

In the Matter of the Libel of *M. Anderson* v. *S. S. "Queen," etc.;* and the Libel of *N. Jordan* v. *S. S. "Umatilla,"* for pilotage fees.

Petition, under the Act of Congress of March 3, 1891, of Pacific Coast Steamship Company, a corporation, claimant and appellee in case No. 641, and petition of

The Pacific Coast Company, a corporation, claimant and appellee in case No. 642, on the records of the Supreme Court of the United States, for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit commanding that it certify before the Supreme Court of the United States the entire record in each of two certain proceedings, to wit, in Nos. 1850 and 1851 on the records of said Court of Appeals.

Petition to Supreme Court of the United States Under the Act of Congress of March 3, 1891, for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Supreme Court of the United States:

Your petitioners, Pacific Coast Steamship Company, a corporation, claimant and appellee in case No. 641; and The Pacific Coast Company, a corporation, claimant and appellee in case No. 642 on the records of this Court—those proceedings being respectively questions certified to this Court in Nos. 1850 and 1851 on the records of the United States Circuit Court of Appeals for the Ninth Circuit—present to this Court this their petition for a writ of certiorari, addressed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court and the clerk thereof to certify to the Supreme Court of the United States the record and proceedings in those two certain cases pending before it entitled

"M. Anderson (Libelant),

Appellant,

vs.

The Pacific Coast Steamship Company (a corporation), Claimant of the Steamship 'Queen', her engines, boilers, machinery, tackle, apparel and furniture (Respondent),

Appellee."

and

"N. Jordan (Libellant),

Appellant,

vs.

The Pacific Coast Company (a corporation), Claimant of the Steamship 'Umatilla', her engines, boilers, machinery, tackle, apparel and furniture (Respondent),

Appellee."

the same being respectively Nos. 1850 and 1851 on the records of said Court of Appeals, together with its opinion in each of said cases, for the review and determination of said causes by the Supreme Court of the United States, as provided in Section 6 of the Act of Congress approved March 3, 1891; and your petitioners respectfully represent as follows:

1. That certain questions arising from the records in the above proceedings Nos. 1850 and 1851 on the records of the United States Circuit Court of Appeals for the Ninth Circuit were heretofore, by the said Court of Appeals, duly certified to the Supreme Court of the United States for its decision thereof—the same being on the records of this Court the above numbered pro-

ceedings 641 and 642—and that the questions so certified have been placed on the calendar of this Court for hearing on February 19, 1912.

2. That there are other questions arising from such records—Nos. 1850 and 1851 on the records of said Court of Appeals—which have not been so certified—upon none of which has the said Court of Appeals expressed an opinion—each of which questions is material and may need be decided before the rights of the respective parties to the aforesaid proceedings can be finally determined.

3. *That there is no controversy in either of said proceedings regarding any fact*—on the contrary the facts are all agreed to by a stipulation of record, a full and true copy of which appears on pages 21 to 37 of the record in the proceedings of *M. Anderson* v. *Pacific Coast Steamship Company*, claimant of the S. S. "Queen," No. 1850 on the records of said Court of Appeals.

4. That said two proceedings were consolidated for trial in the U. S. District Court for the Northern District of California, and have so continued in all proceedings therein since then had.

5. That the record in each case is brief: That each of said proceedings was *in rem*, against the vessel.

6. That the claim asserted by libelant in each of said proceedings is for a pilotage fee under a statute of the State of California—the pilots' services not having been accepted by, and no pilotage service rendered to, either of said vessels or the masters thereof.

7. That the statutes of the State of California relating to pilotage, so far as here material, read as follows:

Section 2432, Political Code:

"All vessels, their tackle, apparel, and furniture, and the masters and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction."

Section 2439, Political Code:

"Any person not the master or owner, and not holding a commission or license as a pilot, who pilots any vessel into or out of any harbor or port of this state for which there are commissioned or licensed pilots, must be punished therefor as provided in the Penal Code, section three hundred and seventy-nine, and must pay to the pilot entitled to pilot such vessel the amount of pilotage or towage collected by him."

Section 2440, Political Code:

"There must be appointed by the governor, by and within the advice of the senate, three experienced and competent shipmasters or nautical men, citizens of the United States, and residents in either of the cities of San Francisco, Oakland, Vallejo, or Benicia, or of the towns of Brooklyn or Alameda, a board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia."

Section 2442, Political Code:

"The commissioners hold their offices during the pleasure of the power appointing them, not exceeding four years from the date of their commissions."

Section 2443, Political Code:

"The commissioners must organize as boards respectively by the election of presidents, secretaries, and treasurers. They must provide for themselves offices, in which they must meet as follows: The 'San Francisco board' must meet once a month in the City of San Francisco * * *."

Section 2445, Political Code:

"The San Francisco board may appoint a secretary and fix his compensation, not to exceed the sum of two hundred and fifty dollars a month. * * *."

Section 2447, Political Code:

"Neither the commissioners nor their secretaries must have any interest in any pilot-boat or steam-tug, nor in the earnings thereof, other than for compensation as herein provided. Any one violating this section forfeits his office."

Section 2460, Political Code:

"Every pilot of the harbor of San Francisco, Mare Island, Vallejo, and Benicia, must once in each month, upon blanks to be furnished to them by the board of pilot commissioners, render a verified account to the board of all moneys received by him, or by any other person for him, or on his account, and pay five per cent. thereof to the board, in full compensation for its official services, for the services of its secretary and treasurer, and all incidental expenses. * * *."

Section 2462, Political Code:

"Any pilot may be deprived of his license before its expiration for the following causes only: * * *

2. For neglect, for thirty days after the same becomes due, to pay over to the board the five per cent. on the pilotage money received by him;"

Section 2466, Political Code:

"The following shall be the rates of pilotage into and out of the harbor of San Francisco: All vessels under five hundred (500) tons three ($3.00) dollars per foot draft; all vessels over five hundred (500) tons three ($3.00) dollars per foot draft and three (3c.) cents per ton for each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot-boat displaying a union jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward bound vessels are not spoken until inside of the bar the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trades shall be exempt from all pilotage except where a pilot is actually employed."

Section 2468, Political Code:

"All vessels sailing under an enrollment, and licensed and engaged in the coasting trade, between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this code."

Section 379, Penal Code:

"Every person, not the master or owner, or not authorized to act as pilot under the laws of this state, who pilots or offers to pilot any vessel to or from any port of this state for which there are commissioned or licensed pilots, or who pilots or offers to pilot any vessel to or from any port other than that for which he is commissioned or licensed, and for which there are pilots so commissioned or licensed, is guilty of a misdemeanor."

8. It is stipulated that the S. S. "Queen," and the S. S. "Umatilla" were each, at the times referred to, duly registered American steam vessels and were sailing "under register" and were then (p. 25, No. 1850) either on a voyage *from the port of San Francisco* in the State of California *to a United States port on Puget Sound, or from a United States port on Puget Sound to said port of San Francisco*, but in either such case said vessel did, while *en route* between such ports in the United States, *stop at the port of Victoria, B. C.*, to and from which said port of Victoria she did then carry and did then and there deliver and receive, both passengers, mail and freight. It is further stipulated (subd. 9, p. 28, No. 1850, and p. 16) that "the stop and stay of said "steamship at said Victoria, for such purpose (dis-"charging and receiving passengers, mail, and freight) "being for about one hour only; and said steamship, "by the clearance thereof granted at said Port Town-"send was authorized to so stop *en route* at said Vic-"toria." (See, also, p. 21, No. 1851, for like stipulations regarding S. S. "Queen.")

9. That (No. 1850, p. 24) at the several times in his said libel mentioned the said N. Jordan tendered to the

master of said S. S. "Umatilla" his, said Jordan's services as a pilot so licensed to pilot said "Umatilla" on her then voyage *out of* said port of San Francisco by going on board said vessel alongside the wharf to which said steamship was then made fast and not more than one hour before she was to and did sail on her voyage therefrom, and then and there orally stating to said master that he, said Jordan, was then and there ready and able and willing to so pilot said vessel and that he, said Jordan, then desired that he be so employed.

10. That (No. 1850, p. 26) each of the masters and first officers of each of said vessels, at all of the times in said several libels and schedules referred to, was duly licensed under the laws of the United States of America to act as and serve as master and as pilot of any American steam vessel when entering, and when departing from, said port of San Francisco, and all of the engineers and other officers of each of said vessels who under the laws of the United States need then be licensed were then duly licensed officers thereof and each of said masters, during the two years next prior to any of the times in said libels referred to, had many times safely and without the assistance of any pilot licensed under authority of the State of California, navigated and piloted vessels under his command then sailing under "register" and of the class of those in said libels and said schedules referred to out of, and into, said port of San Francisco.

11. That (No. 1850, p. 26) no master of any vessel owned or employed by either of said claimants and sailing under "register" had ever, during the twenty (20)

and more years next prior to any of the times in said libels referred to, accepted the services of any of said libelants, nor of any state licensed pilot, to pilot any such vessel out of or into said port of San Francisco; and during all of the times herein last referred to each of said libelants and all state licensed pilots well knew that their services, as pilots licensed by the State of California, to so pilot any such vessel would not if tendered be availed of or accepted by either or any of the masters of such vessel nor by either or any of said claimants.

12. That (No. 1850, p. 27) each and every and all of the said vessels in said several libels or in any schedule hereto attached referred to was, long prior to any of the times in said several libels or said schedules referred to, well known to each and every and all of said libelants and to all state licensed pilots for the said port of San Francisco (that said several vessels sailed from and arrived at San Francisco on a regular schedule, and could be and were, by each and all of said libelants and all state licensed pilots, identified and known, when approaching the port of San Francisco, long before he or any pilot need or in the ordinary course of his business would make any effort to "speak" the same if such vessel were by him thought to be in need of a pilot).

13. That (No. 1850, pp. 27-8) when the present state pilotage regulations for the port of San Francisco were under consideration by the legislature of the State of California, the state licensed pilots for said port appeared before each of the committees of said legislature having such matters in charge and then, by themselves and by their representatives, were heard in connection

with such regulations; and were likewise so heard by the Governor of said state before the Act of the legislature fixing such regulations, as now embodied in certain sections of the Political Code, was approved by him; and the fact long before then had been and then was, and since then has been and still is, that the only steam vessels that had been or were engaged in the coasting trade touching *en route* at a foreign port and sailing under "register" out of or into the said port of San Francisco were such of the vessels of said claimants, to wit, Pacific Coast Steamship Company, or The Pacific Coast Company, as had been and were so employed.

14. It is further stipulated (No. 1850, p. 28) that when the S. S. "Umatilla" sailed from San Francisco she had on board (p. 23, No. 1851) 149 passengers and 1515.4 tons of freight destined to United States ports on Puget Sound, and 31 passengers and 94.4 tons of freight destined to Victoria, B. C.; and that (p. 17, No. 1850) the S. S. "Queen" had on board 279 passengers and 1238.2 tons of freight destined to San Francisco, and that she received at Victoria, destined to San Francisco, 51 passengers and 18.3 tons of freight.

15. The statute of the State of California regarding liens on vessels is Section 813, Code of Civil Procedure, which reads as follows:

> "All steamers, vessels and boats are liable:
>
> "1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.
>
> "2. For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees.

"3. For work done or materials furnished in this state for their construction, repair, or equipment.

"4. For their wharfage and anchorage within this state.

"5. For non-performance, or malperformance, of any contract for the transportation of persons or property between places within this state, made by their respective owners, masters, agents, or consignees.

"6. For injuries committed by them to persons or property, in this state.

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued."

On the foregoing facts the following material questions arise:

(a) May a proceeding *in rem* be maintained to recover the pilotage fee provided by Sections 2466 and 2468, Political Code, when, as here, it is stipulated (p. 31, No. 1850) that "*no pilotage service*, herein re-"ferred to as having been tendered, was accepted": and this especially in view of the further stipulation (subds. 11 and 12 hereof) that all of said pilots had for more than 20 years known that their services, if tendered, would not be accepted by either of said vessels, and, further, could identify the several vessels as those of your petitioners—as vessels that would not accept of their services—"long before he or any pilot need or in "the ordinary course of his business would make any "effort to speak the same if such vessel were by him

"thought to be in need of a pilot." In other words, what the pilots did, when speaking the vessel, was not to make a *bona fide* tender of services which they thought might be needed, but, on the contrary, was only an effort to fix their right to a statutory fee.

In this connection we submit that a maritime lien, a lien that may be foreclosed by a proceeding *in rem* in an admiralty Court, cannot arise from, or result from, a mere tender of services to a vessel: On the contrary, a maritime lien for services arises only from services rendered to or on board of a vessel. Section 813, Code of Civil Procedure, above quoted, provides that a lien for services arises only from services rendered on board the vessel.

In *Steamship Company* v. *Port Warden*, 6 Wall., 31; 18 L. Ed., 749, 750, the Court said:

> "Pilotage is compensation for services performed";

and this Court's Admiralty Rule 14, which authorizes a proceeding *in rem* for "pilotage," therefore means that a suit *in rem* for "pilotage" may be maintained when a pilotage service has in fact been performed.

(b) A further question presented by the record is, Whether, in view of the fact that these proceedings are, in the strictest sense, demands for a statutory fee it be necessary that those things which the statute prescribes, as a means of fixing a pilot's right to the fee, shall in fact be done?

The language of the statute is (Sec. 2466, Pol. Code):

> "Every vessel spoken * * * shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night display-

ing a torch or flare up, within a distance of three (3) miles of the vessel."

It is stipulated that the "Queen", inward bound, was spoken in the manner by the statute provided.

It is also stipulated that the "Umatilla", outward bound, was not so spoken: On the contrary (subd. 9 hereof) the pilot on the vessel as she lay tied to the wharf, and within an hour before she sailed, made a tender of his services to the master of the "Umatilla". That, we respectfully submit, did not meet the requirements of the statute regarding "speaking" the vessel, and therefore did not fix the pilot's right to the statutory fee; a fee a right to which the statute specifically provides shall be fixed by a display from a pilot boat of a union jack by day, or a flare up light by night, within three miles of the vessel.

(c) A further question presented by the records is, May the State of California lawfully levy a tonnage tax on American steam vessels engaged in interstate commerce and sailing under register, for the benefit of the State?

The pilotage fee provided by Section 2466, Political Code, for these vessels is three (3) cents per ton registered measurement and three (3) dollars per foot draft; five (5) per cent. of which tonnage fee, and draft measurement fee, is, in advance of its collection, to wit: was, when the pilotage statute was enacted, by Section 2460, Political Code, appropriated to the use of the State, in payment for the services of its officers.

Petitioners contend that the State is inhibited from levying such tonnage tax for its use by Subdivision 3 of Section 10 of Art. 1 of the Constitution of the United

States; and that the provisions of Section 2460, Political Code, appropriating five (5) per cent. of the tonnage tax to the use of the State makes void all of the provisions of Section 2466, Political Code, fixing the so-called pilotage fees.

(*d*) A further question arising from the records is: Does the language of Section 4444, Revised Statutes, to wit:

> "Nothing in this Title shall be construed to annul or affect any regulation established by the laws of any state, *requiring vessels* entering or leaving a port in any such state, other than coastwise steam vessels, *to take a pilot* duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state";

authorize the State of California to levy a tonnage tax or a pilotage fee on a coastwise vessel sailing under register entering or leaving the port of San Francisco; *the State statute not making it obligatory on any vessel*, or the master thereof, *to take a pilot* when entering or leaving the port of San Francisco.

Your petitioners contend that the State of California may not so do. That the power reserved to the State was to enable it to safeguard passengers and freight when entering or leaving its ports; this by requiring that vessels when so doing *should take a pilot* because, in the judgment of the State, the vessel's navigation was so dangerous as to make the services of a State licensed pilot necessary for her safety—but that no power was so reserved to the State to simply levy a so-called pilotage fee, leaving it, as the California statute does, entirely to the option of the master, or owner, whether his vessel shall, or shall not, be piloted by a state licensed pilot.

(e) A further question arising from the records is, whether, in view of the provisions of Sections 3126, 4361, 4401, 4438, 4442, 4443, 4444, and other sections of the Revised Statutes and Rule 43 of the Board of Supervising Inspectors—under authority given it by Section 4405, Revised Statutes—approved by the Secretary of Commerce and Labor (Edition of March 14, 1906, p. 94) which rule reads:

> "43. *The navigation of every steamer* above 100 gross tons *shall be under the control of a first-class pilot*, and every such pilot shall be limited in his license to the particular service for which he is adapted. Special pilots may also be licensed for steamers of 10 gross tons and under, locally employed",

and the stipulated fact (par. 5, p. 26, No. 1850),

> "5. That each of the masters and first officers of each of said vessels, at all of the times in said several libels and schedules referred to, was duly licensed under the laws of the United States of America to act as and serve as master and as pilot of any American steam vessel when entering, and when departing from, said port of San Francisco, and all of the engineers and other officers of each of said vessels who under the laws of the United States need then be licensed were then duly licensed officers thereof and each of said masters, during the two years next prior to any of the times in said libels referred to, had many times safely and without the assistance of any pilot licensed under authority of the State of California navigated and piloted vessels under his command then sailing under 'register' and of the class of those in said libels and said schedules referred to out of, and into, said port of San Francisco";

the S. S. "Queen," and the S. S. "Umatilla" were each, when enterng or leaving the port of San Francisco, navigated as required by Title LII of the Revised Statutes; and therefore, under the express provisions of Section 4444, Revised Statutes, to wit, "nor shall any "pilotage charge be levied by any such (State) au- "thority upon any steamer piloted as provided by this "Title," the State of California may, by its statutes referred to, subject either of said steam vessels to the payment of any pilotage charge whatever.

Petitioners contend that each of the vessels referred to was, at the times referred to, navigated as provided by Title LII of the Revised Statutes, and that the State of California may not subject either of said vessels, or their owners, to the payment of any pilotage fee whatever.

(f) A further question arising from the records is, Whether, in view of the stipulated facts, the vessels referred to were "coastwise steam vessels" within the intent of Section 4444, Revised Statutes, and, as such, exempt from the pilotage regulations of the State of California?

Petitioners have at all times contended that the vessels referred to were at the times referred to coastwise steam vessels and, as such, were not subject to any pilotage regulations of, or the payment of any pilotage fee provided by, the State of California.

The District Court for the Northern District of California (No. 1850, pp. 57-61, and No. 1851, pp. 47-8) held that the vessels were coastwise steam vessels and, on that ground only, entered its decree dismissing the several libels.

The Circuit Court of Appeals for the Ninth Circuit

(No. 1850, Supm't, pp. 6-20) also so held, and (No. 1850, Supm't, p. 34) affirmed the decrees of the District Court, Gilbert, *J.*, dissenting; but afterwards granted a rehearing and certified to this Court the questions stated in this Court's Nos. 641 and 642.

The foregoing contentions are not here for the first time made—on the contrary, by oral argument and by briefs filed, each of said contentions was pressed upon the attention of the said District Court, and the said Court of Appeals.

While the amounts involved in these two cases are small, it is still a fact (see stipulation No. 1850, pp. 32-52) that a large and constantly increasing amount is dependent upon the final decision of these cases.

It is a stipulated fact, that for twenty years last past no vessel of either of these petitioners and claimants has ever accepted the services of a state licensed pilot at the port of San Francisco. Their ships' masters are all licensed as pilots for the port of San Francisco under the authority of the United States; as are also (No. 1850, pp. 23-4) the State licensed pilots; and there is therefore no apparent need that one duly licensed pilot, for a given port, be there piloted by another pilot licensed for that port by the same authority even if he also be licensed under State authority. It is also a stipulated fact that the vessels referred to (No. 1850, p. 28) enter or depart from the port of San Francisco not less than four (4) times each month, and that the pilotage fee, for simply speaking the S. S. "Queen" is $110—and for simply speaking the S. S. "Umatilla" is $120.

It thus appears that the tax which the State of California has endeavored to impose upon these claimants, simply because the coastwise voyages of their said ves-

sels are made under "register," instead of under "license," is from $440 to $480 per month; and (No. 1850, p. 44) in the case of its steamers "President" and "Governor" is about $560 per month for each vessel when similarly employed.

The questions certified by the Court of Appeals (No. 1850, Supm't, pp. 37-45) touch only the questions stated in subdivisions (e) and (f) of this petition, that is, are questions which relate entirely to the ground upon which the District Court placed its decision, and the ground upon which that decision was, first, affirmed by the Court of Appeals. The questions not certified; that is, those stated in subdivisions (a), (b), (c) and (d) of this petition, we deem to be material and important and, in the event that the decision of this Court on the questions certified shall be adverse to appellees, and the decrees in their favor be finally reversed by the said Court of Appeals, your petitioners would then endeavor, by certiorari or otherwise, to secure the opinion of this Court on the questions above stated and not certified. If, on the other hand, the entire record be ordered certified to this Court all of the questions material to a final decision may be at the same time considered, and a decree be thereupon entered that shall be final.

In the certificate neither the statutory provisions of the State of California which need be considered, nor the stipulated facts that need be considered when the Court is deciding the contentions stated in subdivisions (a), (b), (c) and (d) hereof are set forth; and we respectfully submit that in the absence of the entire records in the proceedings referred to the questions above stated, and not certified by the said Court of

Appeals, cannot be advisedly determined. If those questions be not material to a decision of the cases referred to, then it must follow that the said certificate of the Court of Appeals presents the entire case for this Court's decision; which, we submit, may not properly be so done.

And your petitioners pray that on a presentation and consideration of this petition a writ of certiorari be ordered issued from this Honorable Court addressed to the United States Circuit Court of Appeals for the Ninth Circuit and the clerk thereof commanding said Court and the clerk thereof to certify to the Supreme Court of the United States the entire record in the proceeding pending before it entitled *M. Anderson (Libelant), Appellant, v. The Pacific Coast Steamship Company, a corporation, Claimant of the Steamship "Queen", her engines, boilers, machinery, tackle, apparel and furniture (Respondent), Appellee, No. 1850*, on the records of said Court of Appeals, together with its opinion therein, and the entire record in the proceeding pending before it entitled *N. Jordan (Libelant), Appellant, v. The Pacific Coast Company, a corporation, Claimant of the Steamship "Umatilla", her engines, boilers, machinery, tackle, apparel and furniture (Respondent), Appellee, No. 1851*, on the records of the said Court of Appeals, together with its opinion therein for the review and determination of said causes by the Supreme Court of the United States, as provided in Section 6 of the Act of Congress approved March 3, 1891; and your petitioners further pray that pending a hearing had on said records so to be ordered certified that no hearing be had on the said questions heretofore

certified to this Honorable Court by said Court of Appeals; And your petitioners will ever pray.

SIMPSON, THACHER & BARTLETT,
GEO. W. TOWLE,
Proctors for Petitioners and Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
Counsel for Petitioners and Appellees.

State of California,
City and County of San Francisco.—ss.

Geo. W. Towle being first duly sworn deposes and says: that he has at all times been proctor for petitioners in each of the proceedings in the foregoing petition referred to and as such is better informed regarding the records in said proceedings and the matters in the foregoing petition stated than is either of said petitioners; that he has read the foregoing petition and knows the contents thereof and that the allegations of said petition are to the best of his knowledge, information and belief each and all true.

GEO. W. TOWLE.

Subscribed and sworn to before me this 27 day of January, 1912.

[SEAL] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay and that in our opinion each of the proceedings referred to in said petition is a proper one for granting the relief prayed for.

SIMPSON, THACHER & BARTLETT,
GEO. W. TOWLE,
Proctors for Petitioners and Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
Counsel for Petitioners and Appellees.

To M. Anderson, and N. Jordan, Respondents to the foregoing Petition, and Wm. Denman, Esq., Proctor for each of said Respondents:

You and each of you are hereby given notice that Pacific Coast Steamship Company, and The Pacific Coast Company, petitioners in the foregoing petition, will at the Court room of the Supreme Court of the United States, situate in the Capitol Building at the City of Washington, D. C., and on the opening of said Court on Monday, the 12th day of February, 1912, or so soon thereafter as proctors for said petitioners in such matter may be heard, present the foregoing petition to said Supreme Court and thereupon move the said Court for an order that the writ of certiorari in said petition prayed for be issued, and that the prayers of said petition be granted.

Dated this 26th day of January, 1912.

~~Simpson, Thacher & Bartlett,~~

Geo. W. Towle,

Proctors for Petitioners and Appellees.

No.

In the Supreme Court

OF THE

United States.

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen", her tackle, apparel, etc.,
Petitioner,

vs.

M. ANDERSON, Libelant of said S. S. "Queen," etc.,
Respondent.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla", her tackle, apparel, etc.,
Petitioner,

vs.

N. JORDAN, Libelant of said S. S. "Umatilla", etc.,
Respondent.

Brief on Behalf of Pacific Coast Steamship Company, and The Pacific Coast Company, Petitioners for a Writ of Certiorari from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit.

A simple offer to render services to, or on board of, a vessel does not give rise to a maritime lien: on the contrary a maritime lien arises, in the case of personal services, only from a contract, express or implied, for a maritime service.

In *Barton* v. *Brown*, 145 U. S., 345, 347; 36 L. Ed., 727, 731, the Court said that a lien for pilotage was given, if at all, by the local law.

The law of California gives a lien for personal services to vessels only when, Code of Civil Procedure, Section 813, services have been rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

That state statute gives a lien for "pilotage" as defined by this Court in *Steamship Company* v. *Port Wardens*, 6 Wall., 31; 18 L. Ed., 749, that is, when a pilot's services had been accepted by the master and the pilot has navigated the vessel—but it does not give a lien for pilotage upon a mere tender of a pilot's services, which services are declined.

In *People's Ferry Company* v. *Beers*, 20 How., 393; 15 L. Ed., 961, 964, the Court said:

> "The admiralty jurisdiction * * * is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation."

That is, an admiralty lien may only arise from one of those specified causes.

But here there was no contract, there was no service, there was no duty to accept the pilot's services; the pilot had no right to render the services if they were declined; all there is here is a *claim* for a statutory fee;

a fee to secure the payment of which there is no general maritime lien, and the state statute has given none.

We submit therefore that a proceeding *in rem* to recover such statutory fee may not be maintained.

II.

The tender of the pilot's services to the S. S. "Umatilla" was not so made as to fix his right to the statutory fee.

Section 2466, Political Code, imposes a liability for a pilotage fee only in the event that a vessel be spoken; and in the next sentence defines how a vessel may be so spoken by a pilot as to fix his right to a pilotage fee; and it is stipulated that the "Umatilla" was not spoken in the manner provided by the statute.

A proceeding to fix the right to, and to collect, the statutory fee here claimed is strictly *in invitum*, and therefore the libelant of the "Umatilla" must show a strict compliance with the statute; for, when a statute provides for a fee and states the mode, or manner, by which a right to such fee may be fixed, then the means so provided, and none other, must be used. In such case the mode is the measure of the power.

This is a familiar rule in all tax cases.

In *Moss* v. *Shear*, 25 Cal., 38, 48; the Court said:

> "In order to impart any validity to the Acts of the Assessor, the provisions of the statute must be strictly followed, and all its conditions fully complied with by that officer."
>
> *Smith* v. *Davis*, 30 Cal., 537;
>
> *Taylor* v. *Donner*, 31 Cal., 480, 482.

In *Huntington* v. *C. P. R. Co.*, 2 Sawy., 503, 12 Fed. Cas., 974, 977, the Court said:

> "It has often been held by the Supreme Court of California, and the courts of other states, that taxes and street assessments not assessed in strict accord with the provisions of the statute are void."

As libelant's right here asserted against S. S. "Umatilla" is based upon a California statute, the law of that state should govern.

Martin v. *West*, 4 Advance Sheets, 42—decided Dec. 4, 1911.

III.

The State of California may not, in the guise of a pilotage fee or otherwise, impose a tonnage tax on American registered steam vessels, engaged in interstate commerce, for the use of the state.

The State of California by Sections 2440, 2442, 2443 and 2445, Political Code, creates a number of state officers with fixed terms; fixes their duties and provides for their appointment of a secretary at a salary of $250 per month; and then to enable it to defray the expense thereby incurred levies a tonnage tax of three (3) cents per ton registered measurement on all vessels entering or leaving the port of San Francisco and sailing under "register."

That the whole of the tax so levied is not for the use of the state is, we submit, immaterial. It is sufficient, to render the tax invalid, that it be a tonnage tax and any part of it appropriated to the state's use; and, as

said in *Inman S. S. Co.* v. *Tinker*, 94 U. S., 238; 24 L. Ed., 118:

> "It does not advance the argument in behalf of the appellee (the claimant of the tax) to maintain that the regulations prescribed by the act are necessary and proper in the port for which they are provided."
>
> *Peete* v. *Morgan*, 19 Wall., 581; 22 L. Ed., 201;
>
> *Steamship Company* v. *Port Wardens*, 6 Wall., 34; 18 L. Ed., 750;
>
> *Cannon* v. *New Orleans*, 20 Wall., 577; 22 L. Ed., 417;
>
> *Cox* v. *Lott*, 12 Wall., 204; 20 L. Ed., 373-4;
>
> *Booth* v. *Lloyd*, 33 Fed., 593, 598.

Section 4220, Revised Statutes, reads:

> "No *vessel* belonging to any citizen of the United States, *trading from one port within the United States to another port within the United States*, or employed in the bank, whale, or other fisheries, *shall be subject to tonnage tax or duty*, if such vessel be licensed, *registered* or enrolled."

So far as can be judged by California statute it is not, in the opinion of that state, essential to the safety of vessels entering or leaving the port of San Francisco, that they shall be navigated by a state licensed pilot—this because the state statute does not require that any such vessel shall take any such pilot. All that the state statute does is to fix a pilotage fee—the same in amount whether a pilot's services be accepted or declined—and then leave it entirely to the option of the master or owner of a vessel whether a state licensed pilot shall be employed.

While the statute designates its tax on vessels as

"pilotage fee", we submit that it is a tax levied on vessels simply because they enter and leave the port of San Francisco; certain of such vessels being declared subject to the tax, and the levy of the tax being dependent only on a "union jack", or a "flare up" being displayed by a pilot boat within three miles of the vessel. Such display and the record thereof made is but the counterpart of the listing of property declared subject to taxation by a county assessor.

Adams Express Company v. *Ohio, etc.*, 166 U. S., 185, 218; 41 L. Ed., 965, 976.

The statute considered in *Cooley* v. *Board of Wardens*, 12 How., 299; 13 L. Ed., 996, provided that every designated vessel *shall be obliged to receive a pilot*, failing which a stipulated forfeiture was imposed. That statute was within the power, and we think the only power, reserved to the states by the last clause of Section 4444, Revised Statutes.

A similar statute was considered in *The William Law*, 14 Fed., 792, 797.

The Carrie L. Tyler, 106 Fed. (C. C. A.), 422, 425;

Smith v. *The Creole*, Fed. Cas. No. 13,033.

We respectfully submit that the prayer of our petition should be granted.

SIMPSON, THACHER & BARTLETT,
GEO. W. TOWLE,
Proctors for Petitioners and Appellees.

THOMAS THACHER,
GRAHAM SUMNER,
Of Counsel.

No.

In the Supreme Court
OF THE
United States

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen", her tackle, apparel, etc.,
Petitioner,
vs.
M. ANDERSON, Libelant of said S. S. "Queen", etc.,
Respondent.
} No. 641.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla", her tackle, apparel, etc.,
Petitioner,
vs.
N. JORDAN, Libelant of said S. S. "Umatilla", etc.,
Respondent.
} No. 642.

BRIEF IN OPPOSITION TO PETITION TO CERTIFY WHOLE RECORD.

WM. DENMAN,
Attorney for Respondents M. Anderson and N. Jordan.

Filed this ..... *day of February, 1912.*

JAMES H. McKENNEY, Clerk.

By ..... *Deputy Clerk.*

No.

In the Supreme Court

OF THE

United States

PACIFIC COAST STEAMSHIP COMPANY (a corporation), Owner and Claimant of S. S. "Queen", her tackle, apparel, etc.,

Petitioner,

vs.

M. ANDERSON, Libelant of said S. S. "Queen", etc.,

Respondent.

THE PACIFIC COAST COMPANY (a corporation), Owner and Claimant of S. S. "Umatilla", her tackle, apparel, etc.,

Petitioner,

vs.

N. JORDAN, Libelant of said S. S. "Umatilla", etc.,

Respondent.

BRIEF IN OPPOSITION TO PETITION TO CERTIFY WHOLE RECORD.

The Circuit Court of Appeals has already certified here four questions from the cases in the caption hereof, for the opinion of this Court. They are four

closely related questions as to the control of the pilotage of *registered* steam vessels entering and leaving American ports, having resident bar pilots who are State officers. The reason for the certification and the advance on the calendar of this Court was undoubtedly because these "registered" American steamers are engaged mainly in long voyages between the Atlantic and Pacific ports of the United States (where the commerce is coastwise) or between American and foreign ports; and also because they will carry the large traffic expected to pass through the Panama Canal in so far as it is between Atlantic and Pacific ports of the United States. The danger to vessels coming from these long voyages into ports as difficult of access as those on Chesapeake and Delaware Bays or of the Schuylkill River, or reached only across the San Francisco and Columbia River bars, piloted by the ships' officers having Federal licenses, and who are necessarily after this long absence unfamiliar with port and bar conditions, presented a proper case for the attention of this Court, where, as here, the lower judges were disagreed as to whether the State or Federal pilots should take control.

Now the appellees below are seeking to bring up the whole record in both cases and add new questions of law and fact of widely diversified nature, *but none of them of novel import.* It takes twenty pages of their petition just to state their case, made up mostly from facts from the records below. For while it is true that there was an agreed statement of facts covering some thirty-three pages (half of it irrelevant)

of the record in *Anderson v. "Queen"*, it is not correct to say that there is no dispute as to the *inferences of fact to be drawn from this statement.* There is a serious dispute which is not presented to this Court by the certified questions, but which will have to be determined if the case is to be tried on the entire record.

We say that these new questions so attempted to be introduced are not of novel import. It is not even claimed by our opponent that they are, or that there is a conflict in the lower courts. We will consider each.

a (p. 13 of petition). Has California created a right *against the vessel* for the service of maintaining a pilotage organization consisting of pilots who alternately cruise on the Golden Gate bar, supervised and regulated by a commission, where such service is always available to the vessel when crossing the bar, if the vessel does not accept the service and has not done so for many years prior? Note—not has the State the *power*, but has it *exercised* the power in enacting the particular statutes cited, which, by the way, expressly state that "every "*vessel spoken* * * * shall pay said rates" (petition, page 8), and that "*all vessels*, their tackle, ap- "parel and furniture *are* * * * *severally* liable for "pilotage fees" (petition, page 6). Surely it is not for the mere construing of State statutes of this character that certiorari is granted, even if the question were a doubtful one, as it clearly is not on the face of the petition.

Incidentally it may be remarked that the brief for the guidance of the Court does not even mention these

two statutes but bases its entire argument on another provision of the Codes not concerned with pilotage. It does not mention any case holding such a lien invalid but fails to mention any of the following cases holding it valid:

The Edith Godden, 25 Fed. 511;
The William Law, 14 Fed. 792;
The Glenearne, 7 Fed. 604;
The Algena, 14 Fed. 174;
The Francisco, 14 Fed. 495;
The Alameda, 32 Fed. 331.

b (page 14). Was the outbound vessel properly spoken within the meaning of the statute? This is a matter, first, of inference of fact from the agreed statement; and second, of interpretation of the State regulation. Hardly a question for certification.

c (page 15). Is the pilotage fee a "tonnage tax" on interstate commerce because it is measured by the tonnage of the vessel piloted? This matter was disposed of in the following cases:

Huse v. Glover, 119 U. S. 543;
Harmon v. Chicago, 147 U. S. 396;
Packet Co. v. Keokuk, 95 U. S. 80;
Transportation Co. v. Parkersburg, 107 U. S. 691;
People v. Roberts, 92 Cal. 659.

Is the pilotage fee which is paid to the pilots and the commissioners (who regulate the service, keep track of the river freshets which affect the currents on the bar, etc.) a tonnage tax because both the pilots (14 Cal. 43) and the commissioners are State officers? In other

words, granted that the service is a pilotage service, does it make a fee any more a tonnage tax because it is paid to State officers who perform the service? The question was squarely answered, in the negative, by this Court in the case of *Cooley v. The Port Wardens*, where the fee did not go to the pilots rendering the service at all, but was given to aged pilots, their widows and children.

12 Howard, 313-315.

d (page 16). Is the pilotage fee any more a tonnage tax because, although the organization is constantly maintained and ready at the bar for the incoming vessel, the vessel is liable for the fee even when she does not accept the service? The petition seeks to make a distinction between the coercive effect of a statute which orders a vessel to take a pilot and requires her to pay a fee if she does not, and a statute which says "if you don't take a pilot you will have to pay a fee". For all practical purposes the statutes are identical in their effect on the shipowner although the words of command are omitted from the second. Yet on this trivial distinction the petitioner urges that the fee in the first case (*Cooley v. Port Wardens*, 12 How. 313) is not a tonnage tax, while in the second it is.

e (page 17). This is but a variation of one of the four certified questions, which will be answered in answering them.

f (pages 18 et seq.). Here we have what we are confident contains the real motive for the attempt to obtain certiorari. They desire to make a showing of hardship,

which the cold questions of law asked by the Circuit Court of Appeals do not present. They point out that it costs this vessel $110.00 for maintaining the service which they refuse, and that vessel $120.00, etc., and they seem to urge that the State has abused its powers and made the fee too large.

We take it that the *power* of the States of New York or Louisiana or Oregon to regulate their resident bar pilotage is not to be affected by the *size* of the fee at the port of San Francisco. This Court, we submit, is not concerned with the alleged abuse of a State power, once it is granted to exist. That is a political question and for other tribunals.

We therefore submit that no ground has been shown to exist for the granting of certiorari in this case and that it should be denied.

WM. DENMAN,

Attorney for Respondents M. Anderson and N. Jordan.